TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 159.

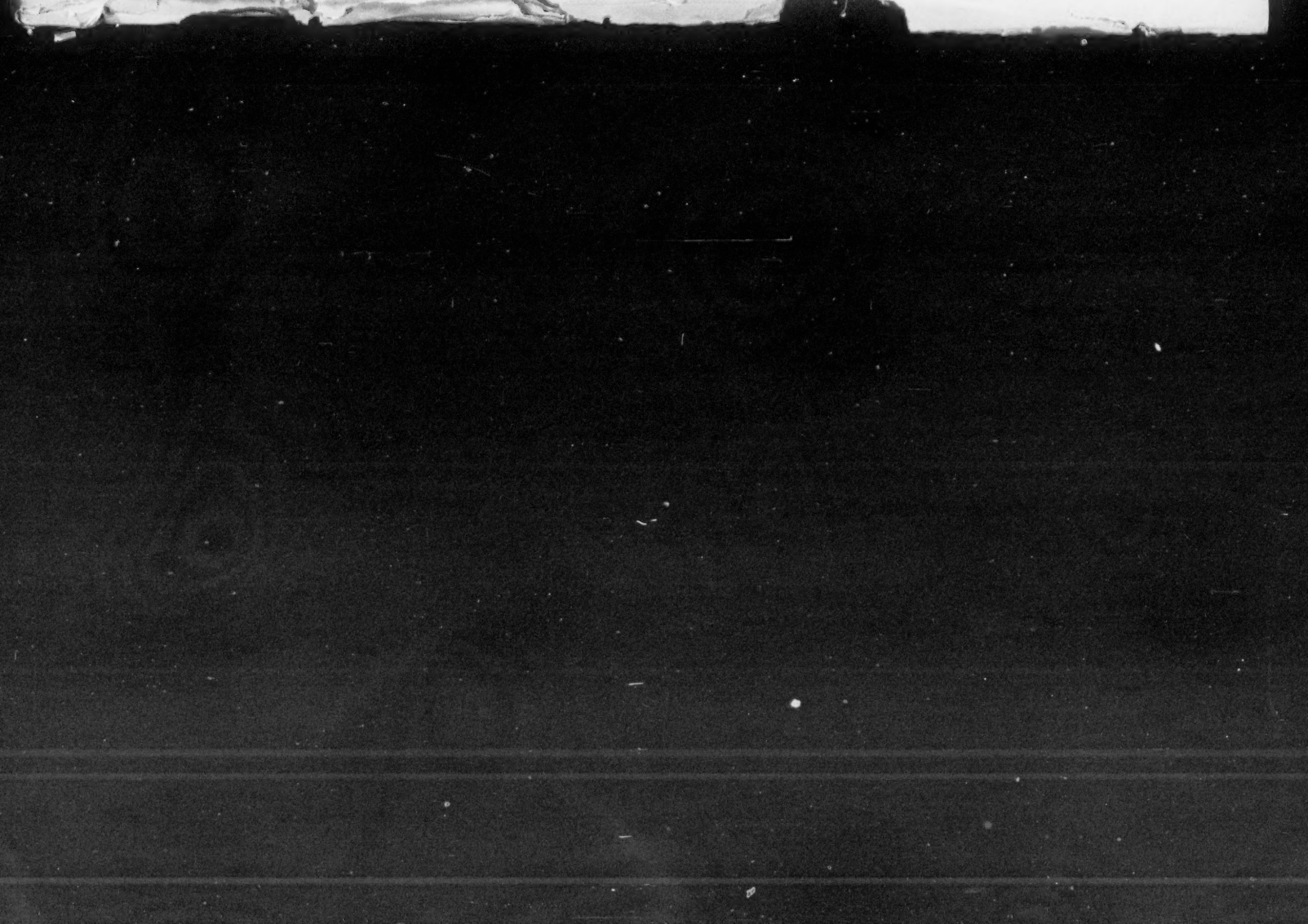
JOSEPH W. STANTON AND WILLIAM L. PALMER, PLAINTIFFS IN ERROR,

vs.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. ATKINSON, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 15, 1874.



SUPREME COURT OF THE UNITED STATES.

No. 159.

JOSEPH W. STANTON AND WILLIAM L. PALMER, PLAINTIFFS IN ERROR,

vs.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. ATKINSON, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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(a) In the supreme court of the District of Columbia, the 13th day of October, 1874.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. Atkinson,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER. } At law. No. 9216. In error.

Know all men by these presents, that we, Joseph W. Stanton and William L. Palmer, as principals, and Alexander S. Palmer and Richard F. Loper, as sureties, are bound unto the above-named James H. Embry, administrator of Robert J. Atkinson, in the sum of nineteen thousand dollars, to be paid to the said James H. Embry, administrator of Robert J. Atkinson, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 13th day of October, 1874.

Whereas the above-named Joseph W. Stanton and William L. Palmer have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Joseph W. Stanton and William L. Palmer shall prosecute *his* said writ of error to effect, and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ALEX. S. PALMER.
R. F. LOPER.

Sealed and delivered in presence of—
O. B. GRANT.

Approved.

D. K. CARTTER,
Chief-Justice.

(Indorsed:) Filed Oct. 15, 1874. R. J. Meigs, clerk.

STATE OF CONNECTICUT,
County of New London, ss:

STONINGTON, *October* 13, 1874.

Personally appeared before me, a notary public for the State of Connecticut, Alex. S. Palmer and Richard F. Loper, signers of the within bond, and made oath in due form, according to law, that they were each worth the amount of this bond, say nineteen thousand dollars, over and above all their debts.

[SEAL.]

O. B. GRANT,
Notary Public.

P. S.—Address, Stonington, Conn.

I hereby declare & certify that I am well acquainted with O. B. Grant, & know that he is a notary public for the State of Connecticut; also, I am well acquainted with the signers of the within bond, & know them to be wealthy, & both retired from all business, and possessing large landed property, and are heavy payers of taxes.

Stonington, Oct. 13, 1874.

[SEAL.]

GEO. HUBBABD,
Collector of Customs.

(b) UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between James H. Embry, administrator of Robert J. Atkinson, plaintiff, and Joseph W. Stanton and William L. Palmer, defendants, No. 9216, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, this 7th day of October, in the year of our Lord 1874, and of the Independence of the United States the 99th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To James H. Embry, administrator of Robert J. Atkinson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Joseph W. Stanton and William L. Palmer are plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER.

Service of the above citation is hereby acknowledged this 7th day of October, A. D. 1874.

LANDER & MERRIMAN,
Attorneys for above named Plaintiff.

(Indorsed:) 9216. Embry, admr, v. Stanton & Palmer. Writ of error. Filed Oct. 7, 1874. R. J. Meigs, clerk.

1 In the supreme court of the District of Columbia, the day of , 1873.

J. H. EMBRY, ADMR. ESTATE R. J. ATKINSON, *vs.* J. W. STANTON & WM. L. PALMER. } At law. No. . In error.

Know all men by these presents, that we, J. W. Stanton and William L. Palmer, as principals, and R. F. Loper and Alex. S. Palmer, as sureties, are bound unto the above-named J. H. Embry, administrator of R. J. Atkinson's estate, in the sum of nineteen thousand dollars, to be

paid to the said J. H. Embry, administrator of R. J. Atkinson's estate, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 15th day of November, 1873.

Whereas the above-named J. W. Stanton and William L. Palmer have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named J. W. Stanton and William L. Palmer shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

J. W. STANTON. [SEAL.]
R. F. LOPER. [SEAL.]
WILLIAM L. PALMER. [SEAL.]
ALEX. S. PALMER. [SEAL.]

Sealed and delivered in presence of—
R. F. LOPER, Jr.
C. B. STATU.
BESSIE MCCORNICK.
CHRISTOPHER ARMSTRONG.

STATE OF CONNECTICUT,
County of New London, ss:

OFFICE OF THE COUNTY CLERK AND CLERK OF THE SUPERIOR COURT FOR SAID COUNTY,
Norwich, November 19, 1873.

This may certify that I am well acquainted with the character and responsibility of the within-named parties to this bond, R. F. Loper & A. S. Palmer, and that they are perfectly responsible and good for the penalty of the within bond.

Witness my hand and the seal of said superior court, at Norwich, the day and year last above written.

[SEAL.] WM. L. BREWER,
Clerk of the Superior Court for New London County, & Clerk of said County.

This may certify that Capt. R. F. Loper and Alex'r S. Palmer are two of our heavyest tax-payers in the town of Stonington, and are assessed in said town for over one hundred thousand dollars, as appears of record.

Attest:

MOSES A. PENDLETON,
Town Clerk of the Town of Stonington.

NEW LONDON COUNTY, *ss:*

STONINGTON, *Nov.* 29, '73.

This may certify that Moses A. Pendleton is the town clerk of the town of Stonington.

[SEAL.] O. B. GRANT,
Notary Public.

Approved Dec. 22, 1873.

MACARTHUR,
Justice.

(Endorsed:) Filed Dec. 22, 1873.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between James H. Embry, administrator of Robert J. Atkinson, plaintiff, and Joseph W. Stanton and William L. Palmer, defendants, at law, No. 9216, a manifest error hath happened, to the great damage of the said defendants as by their complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this 27th day of December, in the year of our Lord 1873, and of the Independence of the United States the 98th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To James H. Embry, administrator of Robert J. Atkinson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Joseph W. Stanton and William L. Palmer are plaintiffs and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness the chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Chf. Just.

Service of the above citation acknowledged this 27th day of December, 1873.

LANDER & MERRIMAN,
Attys. for Deft. in Error.

(Indorsed:) 9216. James H. Embry et al. vs. Joseph W. Stanton et al. Writ of error to Supreme Court U. S. Filed Dec. 27, 1873. R. J. Meigs, clk.

3 The answer of the chief-justice and the justices of the supreme court of the District of Columbia to the foregoing writ of error is in the words following:

Declaration.—Filed 13 Jan., 1872.

In the supreme court of the district of Columbia, this 13th day of January, 1872.

JAMES H. EMBRY, ADMINISTRATOR OF THE estate of Robert J. Atkinson, deceased, plaintiff,
vs.
JOSEPH W. STANTON, WILLIAM L. PALMER, defendants.
} At law. No. 9216.

The plaintiff sues the defendants for services performed and rendered by the said Robert J. Atkinson in his life-time, as attorney for the said defendants and at their request.

4 Also for moneys paid, laid out, and expended by said Robert J. Atkinson during his life-time for the defendants, at their request.

And the plaintiff claims ($10,000) ten thousand dollars, with interest from the 1st day of May, A. D. 1871, according to the annexed particulars of demand.

LANDER & MERRIMAN,
Plff.'s Attys.

The defendants are to plead to this declaration on or before the next special term of the court, occurring twenty days after the service hereof; otherwise, judgment.

LANDER & MERRIMAN,
Attys. for Plff.

Bill of particulars.

J. W. Stanton and W. L. Palmer to R. J. Atkinson.

1870, Feb'y 3.—To services in prosecution of your claim
5 against the United States before the Third Auditor and Second Comptroller, from the year 1865 to date $10,000 00

To subsequent services in same case, before the Sec'y of Treasury & other Treasury officials, by said Atkinson & by plff. as administrator, included in above.

Summons.

In the supreme court of the District of Columbia, the 13th day of January, 1872.

JAMES H. EMBRY, ADMR. OF ROBERT J. ATkinson, plaintiff,
vs.
JOSEPH W. STANTON & WILLIAM L. PALmer, defendants.
} At law. No. 9216.

The President of the United States to the defendants, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on
6 you, to answer the plaintiff's suit, and show why he should not

have judgment against you for the cause of action stated in his declaration.

Witness, D. K. Cartter, chief-justice.

R. J. MEIGS, *Clerk.*

(Merriman.)

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

(Endorsed:) No. 9216—at law. Embry, admr. Atkinson, vs. Joseph W. Stanton & William L. Palmer. Issued 13 Jan'y, 1872.

Served copies of the declaration, notice to plead, and this summons on both the defendants the 15' day of Jan'y, 1872.

A. SHARP,
Marshal.

7 *Plea.*

In the supreme court of the District of Columbia, the 8th day of March 1872.

EMBRY, ADMR. ATKINSON, *vs.* STANTON & PALMER. } At law. No. 9216. Defendants' plea.

Now come the defendants, by R. D. Mussey, their attorney, and defend the wrong and injury, when, &c., and pray judgment of the said declaration, because they say that before the filing of the said declaration in this court, viz, on the 8th day of November, A. D. 1871, the said plaintiff, in the superior court for the county of New London, State of Connecticut, impleaded the said defendants and filed his declaration or summons against them, and attached their property to the value of ten thousand dollars in a plea of the case upon and for the not per-

8 forming the identical promises and undertakings in the said declaration in this suit mentioned, as by a transcript of the original writ in said case, filed herewith and of this plea made a part, marked "Exhibit A," more fully appears.

And the said defendants further say that the parties in this and the former suit are the same, and not other nor different persons, and that the said former suit so brought and prosecuted against the said defendants by the said plaintiff as aforesaid is still depending in the said superior court of the county of New London, State of Connecticut, and this the said defendants are ready to verify; wherefore they pray judgment of the said declaration in this suit, and that the same may be quashed, &c.

J. W. STANTON and
W. L. PALMER.
By R. D. MUSSEY,
Their Attorney.

9 CLERK'S OFFICE, SUP. CT.,
District of Columbia:

R. D. Mussey, attorney for the aforesaid Stanton & Palmer, (non-residents,) being duly sworn, says that, according to his best knowledge, information, and belief, the above plea is true as to the facts therein stated.

R. D. MUSSEY.

Sul scribed & sworn to before me this 8th day of March, A. D. 1872.

R. J. MEIGS,
Clerk Sup. Ct., D. C.,
By CHS. McNAMEE, *Asst. Clk.*

EXHIBIT A.

To the sheriff of the county of New London, his deputy, or to either constable of the town of Stonington, in said county, greeting:

By authority of the State of Connecticut, you are hereby com-
10 manded to attach, to the value of ten thousand dollars, the goods or estate of Joseph W. Stanton and W. L. Palmer, of said Stonington, and them summon to appear before the superior court next to be held in Norwich, in and for the county of New London, on the third Tuesday of November, A. D. 1871, then and there to answer unto James H. Embry, of Washington, in the District of Columbia, who is administrator of the estate of Robert J. Atkinson, late of said Washington, deceased, in a plea of the case whereupon the plaintiff declares and says that the defendants were, on the first day of January, A. D. 1871, justly indebted to the said Robert J. Atkinson, then in full life, but since deceased, in the sum of ten thousand dollars for the work and labor, care and diligence, professional services, skill, and attendance of the said Robert J. Atkinson, by the said Robert J. Atkinson
11 before that time done, performed, and bestowed, as the attorney and solicitor of and for the said defendants, and upon his retainer, in and about the preparation of, prosecuting, trying, and presenting divers causes, claims, suits, and business for the defendants before certain Departments and accounting-officers of the Departments in said city of Washington, and for fees due and of right payable to the said Robert J. Atkinson in respect thereof.

And the said defendants, being so indebted to the said Robert J. Atkinson, undertook and faithfully promised him to pay the said sum of money when they should be thereto afterwards requested; but the defendants, their promise aforesaid not regarding, have never performed the same, but have neglected and refused, and still do neglect
12 and refuse, to pay the said sum of money, or any part thereof, either to the said Robert J. Atkinson in his lifetime, or to the plaintiff, as administrator as aforesaid, since his decease.

And the plaintiff further declares and says that the defendants, the said Stanton and Palmer, had a claim against the Government of the United States for a large sum of money, to wit, for the sum of more than forty-five thousand dollars, for the use, by the said United States Government and the officers and employees thereof, of certain steamboats of the said defendants, and that said claim not being paid, the said defendants employed and retained the said Robert J. Atkinson as their attorney, counsel, and solicitor, to prepare, present, and urge the payment of said claim upon and before the proper Departments of the United States, and in consideration of the labor and services
13 of the said Atkinson in and about the preparation and prosecution of said claim, the defendants undertook and faithfully promised the said Atkinson to pay to him when said claim should be paid and allowed to them, the said defendants, the sum of five per centum of the gross amount of money so received by them on account of said claim of the said defendants.

And the plaintiff says that, although the said Atkinson, relying upon the promise and undertaking of the defendants, did prepare, present, and prosecute said claim, and though said claim, or a large part thereof, to wit, the sum of forty-five thousand nine hundred and twenty-five dollars and seventeen cents, has been paid to said defendants, yet the defendants, their said promise and under-
14 taking not regarding, have never performed the same, but have

neglected and refused, and still do neglect and refuse to pay said percentage or any part thereof to the said Robert J. Atkinson when living, or to the plaintiff, as administrator as aforesaid, since his decease; and the said percentage due to the said Atkinson for his said services remains wholly due and unpaid, though often requested and demanded.

And the plaintiff further declares and says that on or about the day of February, A. D. 1865, in consideration that Robert J. Atkinson, then in full life but since deceased, at the special instance and request of the defendants, did and would prepare, present, and prosecute certain claims of the defendants against the United States before the
15 proper Departments and proper accounting-officers of the Departments of the United States, they, the defendants, undertook and faithfully promised to pay to the said Robert J. Atkinson so much money as he reasonable deserved to have of the defendants when they, the defendants, should be thereto requested; and the plaintiff avers that the said Robert J. Atkinson while living performed the services as requested by the said defendants, and that he, therefore, reasonably deserved to have the sum of ten thousand dollars, of which the defendants afterwards had due notice; yet the defendants, their promise and undertaking aforesaid not regarding, have never performed the same, though often requested and demanded, and have never
16 paid said sum, either to said Robert J. Atkinson in his life, or to the plaintiff as his administrator since his decease.

All which is to the damage of the plaintiff, as such administrator, the sum of ten thousand dollars, to recover which, with just costs, this suit is brought.

Hereof fail not, but of this writ, with your doings thereon, lawful service and due return make. George Pratt is recognized in the sum of $100.00 to prosecute in due form of law.

Dated at Norwich, this 8th day of November, A. D. 1871.

LUCIUS BROWN,
Justice of the Peace.

NEW LONDON COUNTY, *ss:*

STONINGTON, *November 9th*, 1871.

Then and there I made service of the within writ by placing a true and attested copy hereof in the hands of each of the within-named defendants.

Attest: J. B. FILLMORE,
Deputy Sheriff.

17 Travel to serve, &c., $5.20; two copies, 3.00; endorsements, 50; service, 12—$8.82.

I, William L. Brewer, clerk of the superior court within and for said county, hereby certify the foregoing to be a true copy of the original writ.

In testimony whereof I have hereunto set my hand and the seal of said court this 15th day of January, A. D. 1872.

[SEAL.] WM. L. BREWER, *Clerk.*

(Endorsed:) Defendants' plea. Filed 8th March, 1872.

Demurrer to plea.

In the supreme court of the District of Columbia, the 9th day of March, 1872.

JAMES H. EMBRY, ADMINISTRATOR, *vs.* STANTON & PALMER. } At law. No. 9216.

18 The plaintiff says that the plea of defendants is bad in substance.

LANDER & MERRIMAN,
Plff.'s Attys.

And for cause, plaintiff says that the pendency of a suit in the State of Connecticut is no stay or bar to a suit in the District of Columbia for the same cause of action.

LANDER & MERRIMAN.

(Endorsed:) Filed 9th March, 1872.

Joinder in demurrer.

Supreme court, District of Columbia.

EMBRY, ADMR., &C., *vs.* STANTON & PALMER. }

Defendants say that their plea above pleaded is good in substance.

R. D. MUSSEY,
Atty. for Defts.

19 SATURDAY, *March* 23, 1872.

Session resumed pursuant to adjournment; MacArthur, justice, presiding.

JAMES H. EMBRY, ADMR. OF ROBERT J. ATKINSON, plff., *v.* JOSEPH M. STANTON AND WILLIAM L. PALMER. } At law. No. 9215.

Upon argument of plaintiff's demurrer to defendants' plea, it is considered that said demurrer be, and the same is hereby, sustained, and defendants are allowed twenty days in which to plead.

20 In the supreme court of the District of Columbia, the 13th day of April, 1872.

Amendment to plea.

EMBRY, ADMINISTRATOR *vs.* STANTON & PALMER. } At law. 9216.

Now come the defendants in the above-entitled cause, and, pursuant to the leave granted them by the court on the day of , A. D. 1872, and now for then file this amendment to their plea in said case heretofore filed, to wit: after the words "Superior court of the county of

New London, State of Connecticut," in lines 8, 9, & 10, first page of said plea, insert "the said court being a court of general jurisdiction, and competent to try and determine the suit against the defendants
21 by the said plaintiff hereinafter referred to."

R. D. MUSSEY,
Defendants' Attorney.

(Endorsed:) Filed April 13, 1872.

Joinder of issue.

In the supreme court of the District of Columbia, this 25th day of May, 1872.

EMBRY, ADMR.,
vs.
STANTON & PALMER. } At law. No. 9216.

Plaintiff joins issue upon the defendants' plea.

LANDER & MERRIMAN,
Attys. for Plff.

(Endorsed:) Filed 25 May, 1872.

Note of issue.

In supreme court D. C., May 25, 1872.

JAMES H. EMBRY, ADMR. OF ESTATE OF ROBert J. Atkinson,
vs.
STANTON & PALMER. } At law. No. 9216.

22 Last pleading filed May 25, 1872.

LANDER & MERRIMAN,
Plff.'s Attys.

R. D. MUSSEY,
Defts.' Atty.

(Endorsed:) Filed 25 May, 1872.

23 WEDNESDAY, *March* 12, 1873.

Session resumed pursuant to adjournment, Chief-Justice Carter presiding.

JAMES H. EMBRY, ADMR. OF ROBERT J. Atkinson, dec'd, plff.,
v.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defts. } At law. No. 9216.

And now comes the plaintiff, by his attorneys, Mess. Lander & Merriman, as well as the defendants, by their attorney, Mr. Mussey, and a jury of good and lawful men of this District, to wit: John Van Riswick, Michael Duffey, Columbus Alexander, Henry Coburn, George Becker, James R. Harrover, Robert A. Griffin, Robert Tolefarro, Charles Kloman, Columbus O. Wall, Daniel W. Bills, and James M. Terrell, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

24 THURSDAY, *March 13th*, 1873.

Session resumed pursuant to adjournment, Chief-Justice Carter presiding.

JAMES H. EMBRY, ADR. OF ROBERT J. ATKINSON, decd., plff.,
v.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defts.
} At law. No. 9216.

And now again come the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendants by reason of the premises is the sum of nine thousand one hundred eighty-five dollars and eighteen cents, besides costs. And thereupon the defendants, by their attorney, move the court for a new trial upon the exceptions taken at the trial.

25 *Motion for new trial on exceptions.*

In the supreme court of the District of Columbia, the 13' day March, 1873.

EMBRY, ADMR.,
v.
STANTON & PALMER.

The defendants move the court for a new trial upon the exceptions taken.

R. D. MUSSEY,
For Defts.

(Endorsed:) Filed March 13, 1873.

Motion for new trial for reasons.

In the supreme court of the District of Columbia, the 17th day March, 1873.

JAMES H. EMBRY, ADR. OF ROBERT J. ATKINSON,
vs.
JOSEPH W. STANTON AND WM. L. PALMER.
} Motion for a new trial. At law. No. 9216.

The defendants move the court for a new trial, upon the fol-
26 lowing grounds, viz:

1st. That the damages found by the jury are excessive.

2d. That since the trial evidence vital to the case has been discovered.

R. D. MUSSEY,
For Defts.

(Endorsed:) Filed March 17, 1873.

27 MONDAY, *March* 17, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

JAMES H. EMBRY, ADR. OF ROBERT J. ATKINson, plff.,
v.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defts. } At law. No. 9216.

And now again come the defendants, by their said attorney, and move the court for a new trial upon the following grounds, viz:

1st. That the damages found by the jury are excessive.

2nd. That since the trial evidence vital to the case has been discovered.

28 SATURDAY, *April* 19, 1873.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

JAMES H. EMBRY, ADMR. OF ROBERT J. ATKINson, decd. plff.,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defts. } At law. No. 9216.

Upon argument of the defendants' motion for a new trial, it is considered that the same be and is hereby overruled and refused; and thereupon the defendants pray an appeal to the general term.

Bill of exceptions.

Supreme court of the District of Columbia.

EMBRY, ADMR.
vs.
STANTON & PALMER. } Defendants' bill of exceptions. At law. No. 9216.

29 At the trial of this cause upon issue joined, the plaintiff offered evidence tending to prove that he was the administrator of the estate of Robert J. Atkinson, deceased, who died Feb. 25, 1871.

That defendants were owners of certain steamers, which were used by the United States Government during the war of the rebellion at New Orleans, La., and for which use they claimed compensation to the amount of forty-five thousand nine hundred and twenty-five $\frac{7}{100}$ dollars.

That said Atkinson was at one time Third Auditor of the Treasury.

That Judge Wm. Johnston had charge of this claim of defendants, with others of a similar nature, until obliged to give it up on account of an appointment upon the commission to revise the laws of the

30 U. S., when, at request of defendant Stanton, Atkinson was employed to continue the prosecution of said claims, and had full charge thereof.

That Mr. John Jolliffe was at one time employed with Johnston and Atkinson in and about the defendants' steamboat claims, and it was then agreed that the fees resulting from the payment of the claims allowed should be divided among the three—Johnston, Jolliffe, and Atkinson; but that Jolliffe rendered no service in respect to this particular claim.

That Atkinson continued alone in the prosecution of this claim up to

the time of his death, which occurred after the claim was allowed by the accounting-officers of the Treasury Department and settlement made, but before the warrant therefor issued, which was on the 7th of March, 1871.

That Atkinson's services were rendered upon a contingent
31 remuneration; that there was no contract as to the amount of compensation to be paid; that attorneys who prosecute steamboat claims before the Departments usually charge contingent fees of from 20 to 25 %, which the plaintiff's witnesses regarded as a reasonable charge. That the amount awarded and paid to the defendant in this case $45,925\frac{41}{100}$.

That Atkinson was an accurate, faithful professional gentleman, who knew the rules of the Treasury Department well, and who rendered services in and about this case by preparing and filing printed briefs, and that he was the sole attorney in the case and alone interested in the pay.

That the defendant Palmer said, in the Second Comptroller's Office, when trying to have the draft issued to him instead of to Atkin-
32 son, the attorney, that Atkinson should not be wronged of his fee if the draft were sent direct to defendants.

That the said settlement for $45,925\frac{41}{100}$ was made in January, 1870, by the Second Comptroller, but the issuing of the warrant was suspended by the Secretary of the Treasury, on account of the supposed want of jurisdiction, by reason of the act of February 19th, 1867, and the amendatory act of December 23, 1869; and that the warrant did not issue until another amendatory act was passed March 3d, 1871, and that the warrant and draft issued March 7, 1871; and that the draft was received by the defendants, and was paid by the U. S. Treasurer to the order of defendants.

That one of the defendants wrote to Atkinson urging him to labor before the committee of Congress toward the enactment of said act of March 3, 1871.

33 And thereupon the plaintiff rested.

Whereupon the defendants gave evidence tending to show—

That the plaintiff's intestate was the successor, in prosecuting defendants' claims, of Judge Johnston, and of Judge Johnston, Mr. Jolliffe, and Mr. Atkinson. That the compensation was to be contingent upon success.

That while the claims of the defendants were being prosecuted by the predecessors of the plaintiff's intestate, said predecessors gave defendants the following receipts, viz:

"Received, Washington, February 18, 1865, from J. W. Stanton & Co., fifteen hundred dollars, being for fees as solicitor in the claim before 3d Auditor of the Treasury in claim for loss of steamer Anglo-American. The amount received to-day has been taken under protest, and the same fees are to be paid upon any further amount collected.

"$1,500." "WILLIAM JOHNSTON.

34 And,

"Received, Washington, 29 March, 1866, of Messrs. J. W. Stanton & Co., six hundred and two $\frac{67}{100}$ dollars, being for attorneys' fees in connection with their claim against the Government of the U. S. for repairs, &c., of steamers Anglo-American and St. Charles.

"WILLIAM JOHNSTON.
"R. J. ATKINSON.
"JOHN JOLLIFFE."

"$602\frac{67}{100}$."

[Int. rev. stamp cancelled.]

That said sums of $1,500 and $602\frac{67}{100}$ respectively, were 5% of the amounts recovered by virtue of the said services in said receipts named.

That at the time the plaintiff's intestate undertook the said claim of defendants, the accounting-officers of the Treasury held the claims of the nature of the one now in controversy were barred by the act of Congress of July 4, 1864, and that the said officers held that the act of Congress of February 19, 1867, still further barred such claims,
35 and that the acts of December 20, 1869, and of March 3, 1871, were required to remove that bar; which said several acts were offered in evidence. (See 13 St., p. 381; 14 St., p. 397; 16 St., p. 368; 16 St., p. 600.)

That the plaintiff's intestate did nothing to bring about the passage of these acts. That the warrant for the payment of defendants' claim was not issued nor the money paid until after March 3, 1871.

That this cause of action was the same as that of the suit brought in Connecticut, and heretofore pleaded in abatement.

That said Connecticut suit was instituted by plaintiff's orders and pursuant to his instructions.

That the statement of the services of the defendants' boats was made up before it was sent from the Quartermaster-General's Office to the Treasury Department, prior to Atkinson's employment.

36 And thereupon the defendants rested.

And thereupon the defendants prayed the court to instruct the jury as follows:

1st prayer. If the jury shall find from the evidence that the plaintiff's decedent was engaged by the defendants to prosecute for a contingent compensation the allowance by an Executive Department of the United States Government of a claim against the United States, then the contract was inhibited by law, and the plaintiff cannot recover in this case.

2d prayer. If the jury shall find from the evidence that the plaintiff's decedent undertook to procure the payment to the defendants of a certain claim, for a compensation to be contingent upon the success of his efforts, then the plaintiff cannot recover, unless it shall have been
37 proven to the jury that the labors of said decedent in behalf of the defendants were continued up to the time when payment was in fact made.

3d prayer. If the jury shall find from the evidence that the plaintiff's decedent was employed by the defendants to procure the payment of a claim against the United States, the payment of which was prohibited by law when he undertook the case, the plaintiff cannot recover, unless he have shown that his decedent either procured, or labored to procure, such modification of the law as would remove the bar to the payment of said claim.

4th prayer. That the evidence of attorneys or claim-agents tending to show what is ordinarily charged for "steamboat-claims" is to be disregarded. Any attorney or claim-agent who knows the actual
38 amount of work that was performed by plaintiff's decedent in the prosecution of this claim, and who is familiar with the price usually charged for such work, may testify what in his opinion such work was worth; but testimony of what attorneys or claim-agents generally charge for cases where steamboats have been seized is not to be regarded by you as a basis of estimating what the services of plaintiff's decedent were worth.

5th prayer. If the jury shall find that the plaintiff is entitled to recover, and shall further find from the evidence that the series of defendants' claims of which this is one was undertaken and several of them

prosecuted by Judge Johnston, at a compensation of 5% on the amount recovered, and further, that in consequence of a legal disability to
39 prosecute them further the said Johnston turned over said claims to the plaintiff's decedent for prosecution, then, in the absence of proof to the contrary, the jury may infer that the same rate of compensation obtained between Judge Johnston's successor and the defendants as obtained between them and Judge Johnston.

Which prayers, and every of them, the court overruled, and which instructions, and all of them, the court refused to give the jury; and thereupon the court proceeded to charge the jury as follows, viz:

Charge.

GENTLEMEN OF THE JURY: 1. Mr. Embry, as administrator of Atkinson, deceased, brings his suit against Stanton & Palmer, the defendants, to recover what he alleges to be due his intestate for
40 professional services rendered to the defendants in the life-time of the intestate.

2. He appeals to you, in the forms of law, to give the plaintiff for his services what is right in view of the professional labor that he has rendered.

3. This claim is met with a prayer, first, that although you shall find from the testimony that he was employed as attorney, and as such he did mingle his labor and professional skill in the procurement of the claim of the defendants, notwithstanding he cannot recover because the service is against the law, under the prohibition of the law, which in this class of cases does not permit of recompense. Now, there is a class of cases which are obnoxious to the law. Where an attorney or
41 non-professional agent enters into an engagement to exercise his personal influence or the influence of his position, his official position, with an officer of the law to superinduce judgment in behalf of his client, the employment is pronounced by the law to be vicious, against public policy, against the integrity of government, and he cannot receive the reward.

Distinguished from this class of cases, however, is the case where a man in the exercise of his ordinary labor and calling, and with the instrumentalities of his professional learning and industry, undertakes to work out a desired result for his client, not through personal influence but through the instrumentalities of the law—by persuasion as distinguished from influence. He may be paid. There is no more reason for holding this class of labor under the interdict of the law than any other class of labor.

42 In the construction of our Government and in the relation of our citizens to it, in dealing with it and its departments there is frequently and necessarily required a degree of knowledge and skill, and acquaintance with forms and principles, that is not possessed by the unlettered citizen, before he can obtain that which is justly his due; and when the labor is exercised by the class of persons who do possess that knowledge, and in that way, as attorneys, there is no more reason in defeating them of their pay than there is the mechanic of his pay for labor done by him.

If you find that the employment of Mr. Atkinson was the employment of a professional man in the ways of his profession, and was not the employment of a man to exercise and wield an undue influence over the administrative officers of the Government; if you shall find
43 that he was so engaged by the defendants, you may find for him

notwithstanding the instruction asked in the first prayer of defendants, which is overruled.

4. And you may find for him what he ought to receive in the absence of any proof of a special agreement as to his reward.

5. There has been some intimation that the undertaking was by special agreement at the rate of five per cent., as contingent compensation, and the defendants' counsel appeals to you that there is proof of such a contract; that the predecessor of Atkinson in the prosecution of defendants' claims had received five per cent. compensation on the amounts recovered by him. You had before you the testimony in that regard as pointing to that compensation. You have heard the
44 testimony of others as to rates of compensation in such cases. You have the right to take into consideration the fact of the allowance made theretofore under the circumstances under which it was made, as guiding your judgment to a conclusion. If that is satisfactory that there was a contract, you will hold the parties to the limitations of that contract; but it must be proved. The law presumes that when one enters upon labor for another, in the absence of any special agreement for reward, that he is entitled to and shall receive such reward as his labor is worth. The law makes the contract that he shall receive a reasonable compensation therefor. In the absence of any special agreement between these parties, the law steps in and makes the agree-
45 ment for them. If you find that any special agreement was made, your verdict must be limited to the amount of that agreement.

6. The court has permitted to be given in evidence here the character of this claim, the character of the professional services rendered in its prosecution, the character of the intestate for ability to perform those services, his honesty and skill, and in addition the customary reward for this description of services. It is objected here by counsel for defendants, that this last is the custom of others in similar cases should not be considered by you, and should not govern the subject. It should not alone govern the subject, but is proper to be resorted to with a view of obtaining what the intestate's compensation should be.

46 7. The ground for paying a large per cent. in contingent cases is, that the fees for services must bear relation to and take color from the services performed. If a man is to spend his time, labor, and learning in the direction of a given result, to be paid if that result is accomplished, and nothing unless it is, the custom of the profession is as testified to by these gentlemen. You have listened to it. The intendment of reason, too, attaches, that the reward shall correspond to the risk of getting nothing in the case of failure. This testimony is not final, but it constitutes an element in determining the amount due the plaintiff. These remarks, with one exception, cover the entire case.

8. It is urged here that without you find that the labor of the intestate continued to the period of satisfaction of this claim by the Gov-
47 ernment, you will not render a verdict for the plaintiff. This paper is predicated on the fact that before the ultimate payment, Atkinson was seized with mental disease, and shortly before became insane and incapable of discharging professional service. It is therefore reasoned that he is not entitled to recover because his claim predicated on the contingency of realization, and because he was overtaken with sickness before his clients were overtaken with justice. This would be an unjust conclusion to come to. The spirit of this contract is that he will mingle his labor and intellect with those of the accounting-officers, with a view to superinduce the result his clients wished; and if

you find that it was through his labor and industry or enlightenment (for his office was simply to enlighten the judgment of the gentlemen in charge of the claim) that the claim was satisfied, and not
48 through those of other agents—that the fruit of the claim grew out of his labor—you will find that he is entitled to his pay, notwithstanding he died a day or two before the claim was paid. This is the christianity of this case, and I inform you it is also the law of this case.

9. The defendants ask me to instruct you that because the law did not furnish an equitable blanket wide enough to cover them, and auxiliary legislation was rendered necessary to work out justice, that that fact that legislation was necessary to the consummation of payment, that that intervention, should defeat the plaintiff. Now, the court does not understand the case in this light, although the testimony seems
49 to carry this man before committees of Congress as well as before Departments. But even if it did not, the fact that such legislation was necessary don't defeat his right. His clients assumed to have a claim against the Government and employed him to prosecute it, and if informality or technicality rendered legislation necessary, it was only in aid of his services, and not to supersede them. That prayer is overruled.

10. In reference to the amount of your recovery, you should be reasonable in this case as in all others. The profession of law is an honorable one—an enlightened one; but it has its excesses, and its professors are liable to run into these excesses. You are to be regulated here by the same solid, substantial considerations of justice that you exercise with reference to any other claim.

50 11. You have heard the testimony of these gentlemen who prosecute this kind of claims, and they state that the contingent compensation ranges from 10 to 25 per cent. in the absence of special contract, and you will find that amount on which your consciences rest the easiest.

12. I believe this disposes of all the defendants' prayers, which, except as modified in this charge, are overruled. Take the case and do what is right.

To which overruling of said prayers and to which refusals, and to each of them, the defendants, by their counsel, excepted before the giving of the verdict, (and the said chief-justice noted the same upon his minutes.)

51 And to the said charge of the said chief-justice, in so far as it substituted instructions for those prayed for, and especially to the paragraphs thereof numbered 3, 5, 6, 7, 8, 9, 11, and to each of them, the defendants, by their counsel, excepted before the giving of the verdict, (and the said chief-justice noted the same upon his minutes.)

And the said jury thereupon gave their verdict against the defendants.

And the said defendants, by their counsel, request the said chief-justice to put his seal to this their bill of exceptions, containing the several matters given in evidence to the jury and the several prayers offered by the defendants, and their overruling by the said chief-justice, and the said several instructions and charge to the jury; and the said chief-justice (now for then) puts his seal hereto the 3d day of May, 1873.

SEAL.] D. K. CARTTER,
Chief-Justice.

(Endorsed:) Filed August 13, 1874. nunc pro tunc.

52 MONDAY, *September* 29, 1873.

Session resumed pursuant to adjournment; present, Chief-Justice Cartter and Justices Olin, Wylie, and Humphreys.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. Atkinson, plff.,
vs.
JOSEPH W. STANTON & WILLIAM L. PALMER, defts. } At law. No. 9216.

Argued by Mr. Merriman for plaintiff, and by Mr. Mussey for defendants, and submitted to court.

MONDAY, *October* 27, 1873.

Session resumed pursuant to adjournment; present, Chief-Justice Cartter and Justices Wylie and Humphreys.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. Atkinson, plff.,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defendants. } At law. No. 9216.

53 And now again come here as well the plaintiff as the defendants, by their respective attorneys; and because it appears to the court that there is not in the record or judgment of the circuit court any error, therefore it is considered that the said judgment be, and the same is hereby, affirmed; and that the defendants, who appealed to this court from the judgment of the circuit court, pay the costs of the cause in this court to be taxed by the clerk.

54 Proceedings before the supreme court of the District of Columbia in general term, commencing on the 4th Monday, 28th day, of September, 1874; present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

JAMES H. EMBRY, ADMINISTRATOR OF ROBERT J. Atkinson, plff.,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defendants. } At law. No. 9216.

On motion of the plaintiff, by his attorney, Mr. Hornor, it appearing to the court that the judgment of affirmance entered in this case on the 27th of October, 1873, (ante, page 264,) should have been a judgment on the verdict in the circuit court, on which verdict the circuit rendered no judgment, it is ordered that said entry be stricken out and the proper judgment entered now for then.

55 JAMES H. EMBRY, ADMINISTRATOR OF Robert J. Atkinson, plff.,
vs.
JOSEPH W. STANTON AND WILLIAM L. PALMER, defendants. } At law. No. 9216.

And now come here as well the plaintiff as the defendants, by their attorneys, respectively; and because it appears to the court that there is not in the record and proceedings of the circuit court any error, therefore it is considered that the plaintiff recover against the defendants

the sum of nine thousand one hundred and eighty-five dollars and eighteen cents, in manner and form aforesaid found, with interest thereon from the 13th day of March, 1873, and the further sum of $ for his costs of suit, and have execution thereof.

56 *Clerk's certificate.*

Authentication of record.

CLERK'S OFFICE,
Supreme Court of the District of Columbia:

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 2d day of October, 1874.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Assistant Clerk.

(Clerk's fees for transcript, $18.00.)

(Indorsement on cover:) No. 159. Joseph W. Stanton & William L. Palmer, plaintiffs in error, *vs.* James H. Embry, admr. of Robert J. Atkinson, decd. Dist. of Columbia sup. court. Filed 15th October, 1874.

1 Sup. Court U. S., Oct. T., 1876.

J. W. STANTON ET AL.
vs.
J. H. EMBRY, ADMINISTRATOR OF R. J. ATKINSON. } No. 159.

In order to complete the record in this case, which has only recently been printed & furnished the respective counsel, it is hereby agreed that the plea of general issue (not indebted and never promised) be supplied, and considered as printed in the record, page 10, just before the entry of joinder of issue upon which the case was tried by the jury and disposed of by the court below.

This agreement is made by counsel in order to avoid the delay and expense of a suggestion of diminution of record and an application for a certiorari.

2 Washington, D. C., October 21, 1876.

LANDER & MERRIMAN,
Attys. for Deft. in Error.
DURANT & HORNOR,
Attys. for Plaintiffs in Error.

(Endorsed:) No. 159. Oct. T., 1876. U. S. Supreme Court. J. W. Stanton et al., plffs. in error, vs. Embry, admr. of Atkinson. Agreement of counsel as to completion of record. Filed 23 October, 1876.

U. S. Supreme Court, Oct. T., 1876.

J. W. STANTON ET AL., PLFF. IN ERROR,
vs.
J. H. EMBRY, ADMR. OF R. J. ATKINSON. } No. 159.

3 On motion of Durant & Hornor, of counsel for the plffs. in error, J. W. Stanton et al., and with the annexed written consent of Messrs. Lander & Merriman, and on showing to the court that erroneously there has been omitted from the record in this case the plea of the general issue (not indebted and never promised) on which this case was tried by the jury and disposed of in the court below,

It is now ordered by the court that said plea be made and considered a part of the record in this case, and deemed & taken to have been printed in the words and figures following:

"The defendants say that they were never indebted as alleged, and that they did not promise as alleged.
"WASHINGTON, D. C., *May* 18, 1872."

4 And that this motion and plea be ordered to be printed and made part of the record in this case.

DURANT & HORNOR,
For Plffs. in Error.

We hereby assent to the above.
October 21, 1876.

LANDER & MERRIMAN,
Deft.'s Attys.

(Endorsed:) No. 159. Oct. T., 1876. U. S. Supreme Court. J. W. Stanton et al., plffs. in error, vs. J. H. Embry, administrator of R. J. Atkinson. Motion & assent to the completion of the record. Durant & Hornor, attys. for plffs. in error. Filed 23 October, 1876.

JOSEPH W. STANTON ET AL., PLFFS. IN ERROR,
vs.
JAMES H. EMBRY, ADMR., &C. } 159.

Mr. C. W. Hornor, of counsel for the plaintiffs in error, filed agreement of counsel to amend the record in this cause.

In the Supreme Court of the United States.

JOSEPH W. STANTON AND WILLIAM L. PALMER,
PLAINTIFFS IN ERROR,
vs.
JAMES W. EMBREY, ADMINISTRATOR OF ROBERT J. ATKINSON, DECEASED.

No. 159.

In Error to the Supreme Court of the District of Columbia.

Brief of Counsel of Plaintiffs in Error.

STATEMENT OF THE CASE.

1. On the 13th January, 1872, the plaintiff filed his declaration in the court below, claiming from the defendants, who are plaintiffs in error here, $10,000, with interest from the 1st of May, 1871, for service alleged to have been performed in prosecuting a claim of plaintiffs in error against the United States before the Third Auditor of the Treasury from the year 1865 to February 3, 1870, and subsequently by the said R. J. Atkinson and by James W. Embrey, his administrator, before the Secretary of the Treasury and other Treasury officials.

See Record, p. 5.

2. To this declaration the defendants below pleaded in abatement the pendency of a suit for the same cause of action, by the same plaintiff, against the same defendant, in the superior court for the county of New London, in the State of Connecticut, which then was and still is the county of the residence of plaintiffs in error.

See Record, p. 6.

3. There was filed with this plea in abatement a duly-authenticated copy of the summons served on plaintiffs in error here in the suit in Connecticut.

See Record, pp. 7 and 8.

4. To this plea in abatement the plaintiff below demurred, and defendants below having joined in demurrer, the demurrer was sustained, with leave to defendants below to plead in twenty days.

See Record, p. 9.

5. The defendants below then pleaded "not indebted" and "never promised," and on these pleas the plaintiff below joined issue.

See Record, p. 10, and plea supplied by consent of parties.

The case was tried by a jury, who, under instructions from the court, gave a verdict in favor of the plaintiff below, and against the defendants below, for $9,185.18, besides costs.

See Record, p. 11.

7. A motion for a new trial was made by defendants below, (see Record, p. 11,) which was heard at the general

term of the court, and judgment entered on the verdict for $9,185,18, from the 13th day of March, 1873.

See Record, pp. 18 and 19.

8. The case, as presented to this court, involves these questions:

A. Had the supreme court of the District of Columbia jurisdiction to entertain the case while the same cause of action between the same parties was in litigation in the court of the county of New London, in the State of Connecticut?

This question arises from the plea in abatement filed by defendants in the court below, (Rec., p. 6,) the demurrer of plaintiff below to said plea, (Rec., p. 9,) and the judgment of the court below sustaining the demurrer, (Rec., p. 9.)

See Record, pp. 6, 7, 8, and 9.

B. The evidence on the trial below tending to prove that the remuneration of Atkinson's, the plaintiff's decedent's, services in prosecuting the claim of defendants below before the Treasury Department was to be contingent upon success in collecting, (see Rec., p. 13, fol. 31 and fol. 33,) whether such contract was forbidden by the act of Congress of February 26, 1853, sec. 1?

10 U. S. Stat. at Large, p. 170; Rev. Stat., sec. 3477?

The question arises on the bill of exceptions of defendants below, (Rec., p. 13,) on the first prayer of defendants below for a charge, (Rec., p. 14, fol. 36,) and on the refusal of the court to charge as requested.

Rec., pp. 15 and 16, fol. 43, third clause of the judge's

charge at its close, and p. 17, fol. 50, 12th clause of charge.

C. The evidence on the trial below also tending to prove that the claim of defendants below on the United States was for the use by the Government of certain steamers, the property of said defendants, during the war of the rebellion, in the insurrectionary State of Louisiana, (see Rec., p. 12, fol. 29,) whether a contract to prosecute such claim before the Treasury Department was not forbidden by—

1st. The act of 19th February, 1867.

14 U. S. Stat. at Large, pp. 397 and 398.

2d. The joint resolution of December 23, 1869.

16 U. S. Stat. at Large, p. 368.

This question arises on the bill of exceptions, (Rec., p. 12, fol. 20, and p. 13, fol. 32,) on the third prayer of the defendants below for a charge, (Rec., p. 14, fol 37,) and by the refusal of the prayer so to charge by the court.

See Rec., p. 17, fol. 48, 9th clause of charge, and p. 17, fol. 50, 12th clause of charge.

D. The evidence on the trial below also tending to show that plaintiff below having contracted for a fee contingent upon success, and to be paid only in case of the collection of the claim; that the claim was paid on the 7th March, 1871, (see Rec., p. 13, fol. 32;) that before that date Atkinson, plaintiff's decedent, had died on the 25th February, 1871, (see Rec., p. 12, fol. 29,) whether the death of the said Atkinson did not put an end to the contract between him and the defendants below, and relieve the latter from

all obligation to pay for any services rendered under said contract?

The question arises on the bill of exceptions, (Rec. p. 12, fol. 29, and p. 13, fol. 32,) on the second prayer for a charge made by defendants below, (see Rec., p. 14, fol. 36, 37,) and on the refusal of the court below to charge as requested.

See Rec., p. 16, fol. 47, 8th clause of charge.

E. The evidence in the court below also tending to show that the compensation of plaintiff's decedent was to be contingent upon his success in collecting the claim on the United States of the defendants below, whether the proof put in by plaintiff below tending to show by witnesses what compensation as contingent fees is ordinarily charged in "steamboat cases" was admissible when there was no proof of what work was actually performed by the deceased Atkinson?

This question arises on the bill of exceptions and fourth prayer for a charge to the jury, (see Record, page 14, fol. 38,) and by the sixth clause of the charge of the judge.

See Record, p. 16, fol. 45, and paragraph 12, Rec., p. 17, fol. 50.

F. The evidence in the court below tending to show that the claim of defendants below had been originally, with other claims of defendants below, placed in charge of Judge William Johnson, who was obliged to give it up on account of other engagements, and that the claim was then transferred to the deceased Atkinson to continue the prosecution thereof, (see Rec., p. 12, fols. 29 and 30;) that the deceased, Atkinson, was the successor of Judge Johnson and John Joliffe in prosecuting the claim in question,

(see Rec., p. 13, fol. 33;) and that the compensation of Atkinson's said predecessors, Johnson and Joliffe, and including Atkinson himself in one receipt, was five per centum on the amounts collected by them, (see Record, p. 14, top, fol. 34,) whether Atkinson was not bound by this rate of compensation of his predecessors and himself, and could not legally charge and be allowed more than five per centum on the amount collected?

This question arises on the bill of exceptions, (Rec., pp. 13 and 14,) on the fifth prayer of the defendants below for a charge, (see Rec., pp. 14 and 15, fols. 38 and 39,) and on the refusal of the court so to charge.

See 12th clause of judge's charge, Rec., p. 17, fol. 50.

G. The evidence in the court below tending to show that the settlement of the claim on the United States of the defendants below not having been made by the Second Comptroller until January, 1870; that the issuing of a warrant for its payment was then suspended by the Secretary of the Treasury for want of jurisdiction under the then existing laws; that the warrant and draft did not issue until March, 7, 1871, and until the passage of the amendatory legislation of March 3, 1871, (see Rec., p. 13, fol. 32;) and that the plaintiff's decedent, Atkinson, did nothing to bring about the passage of the amendatory legislation in question, (see Rec., p. 14, fol. 35,) whether the judge of the court below was justified in saying to the jury "that the testimony seems to carry this man," (meaning the plaintiff's decedent, Atkinson,) "before the committees "of Congress, as well as before Departments."

See Rec., p. 17, fols. 48 and 49.

This question arises on the bill of exceptions, (Rec., p.

13, fol. 32; p. 14, fol. 35,) and charge of the court below, (clause 9, Rec., p. 17, fol. 48 and 49.)

H. Whether the judge of the court below was justified in saying to the jury in his charge that a particular view which he presented to them in his charge was "the chris-"tianity of the case as well as the law of it," (see Record, p. 17, fol. 48;) and whether he was justified in saying to the jury at the close of his charge, "Take the case, "and do what is right."

See Record, p. 17, fol. 50.

This question arises on the 8th and 12th clauses of the charge, (p. 17 of Record,) and was the exception to the charge.

Rec., p. 17, fol. 51.

I. Whether the judge of the court below was justified in saying to the jury in his charge, "and you may find for "him"—meaning the plaintiff—"what he ought to receive "in the absence of all proof of a special agreement as to "his reward."

See Rec., p. 16, fourth clause of charge, fol. 43.

This question arises on the fourth clause of the charge of the judge below, (Rec., p. 16, fol. 43,) and on the exceptions to charge.

Rec., p. 17, fol. 50.

K. Whether the judge of the court below was justified in saying to the jury in his charge that "if informality or "technicality rendered legislation necessary, it was only

" in aid of his "—plaintiff's decedent's—" services, and " not to supersede them."

See Rec., p. 17, fol. 49.

This question arises on the charge of the judge below, in the ninth clause thereof, (p. 17, fol. 49,) and on defendant's exception thereto.

P. 17, fol. 51.

ASSSIGNMENT OF ERRORS.

We respectfully assign as error—

First. That the court below sustained the demurrer of plaintiffs below to the plea in abatement of *lis pendens* in the court of New London county, Connecticut, for the same cause of action and between the same parties.

Second. That the court below refused the first prayer for a charge to the jury made by the defendants below in these words:

" If the jury shall find from the evidence that the plain-
" tiff's decedent was engaged by the defendants to prose-
" cute for a contingent compensation the allowance by an
" Executive Department of the United States Government
" of a claim against the United States, that the contract
" was inhibited by law, and the claimant cannot recover in
" this case."

See Rec., p. 14, fol. 36.

And that the judge of the court below charged the jury in these words:

" Now there is a class of cases which are obnoxious to
" the law. Where an attorney or non-professional agent

" enters into an engagement to exercise his personal influ-
" ence or the influence of his position, his official position,
" with an officer of the law to superinduce judgment in
" behalf of his client, the employment is pronounced by
" the law to be vicious, against public policy, against the
" the integrity of Government, and he cannot receive the
" reward.

" Distinguished from this class of cases, however, is the
" case where a man in the exercise of his ordinary labor
" and calling, and with the instrumentalities of his profes-
" sional learning and industry undertakes to work out a de-
" sired result for his client, not through personal influ-
" ence, but through the instrumentalities of the law, by
" persuasion as distinguished from influence, he may be
" paid. There is no more reason for holding this class of
" labor under the interdict of the law than any other class
" of labor.

" In the construction of our Government, and in the re-
" lation of our citizens to it, in dealing with it and its de-
" partments there is frequently and necessarily required
" a degree of knowledge and skill and acquaintance with
" forms and principles that is not possessed by the unlet-
" tered citizen before he can obtain that which is justly his
" due, and when the labor is exercised by the class of
" persons who do possess that knowledge, and in that way,
" as attorneys, there is no more reason in defeating them
" of their pay than there is the mechanic of his pay for la-
" bor done by him.

" If you find that the employment of Mr. Atkinson was
" the employment of a professional man in the ways of his
" profession, and was not the employment of a man to ex-
" ercise and wield an undue influence over the administra-
" tive officers of the Government; if you shall find that he
" was so engaged by the defendants, you may find for him

" notwithstanding the instruction asked for in the first " prayer of defendants, which is overruled."

See Rec., pp. 15 and 16, fols. 40 to 43.

Third. That the court below refused the second prayer for a charge to the jury made by defendants below in these words:

" If the jury shall find from the evidence that the plain- " tiffs' decedent undertook to procure the payment to the " defendants of a certain claim for a compensation to be " contingent upon the success of his efforts, then the plain- " tiff cannot recover unless it shall have been proven to " the jury that the labors of said decedent in behalf of the " defendants were continued up to the time when payment " was in fact made."

See Rec., p. 14, fols. 36–7.

And that the judge of the court below charged the jury in these words:

" It is urged that without you find that the labor of the " intestate continued to the period of satisfaction of this " claim by the Government, you will not render a verdict " for the plaintiff. This paper (the word 'paper' is evi- " dently a misprint for the word 'prayer') is predicated " on the fact that before the ultimate payment Atkinson " was seized with mental disease, and shortly before be- " came insane and incapable of discharging professional " service. It is therefore reasoned that he is not entitled " to recover because his claim (here the word 'was' is left " out, evidently by a misprint) predicated on the contin- " gency of realization, and because he was overtaken with " sickness before his clients were overtaken with justice. " This would be an unjust conclusion to come to. The

" spirit of this contract is that he will mingle his labor " and intellect with those of the accounting officers, with " a view to superinduce the result his clients wished; and " if you find that it was through his labor and industry or " enlightenment (for his office was simply to enlighten the " judgment of the gentlemen in charge of the claim) that " the claim was satisfied, and not through those of other " agents—that the fruit of the claim grew out of his la- " bor—you will find that he is entitled to his pay, notwith- " standing he died a day or two before the claim was paid. " This is the christianity of this case, and I inform you it " is also the law of this case."

See Rec., pp. 16 and 17, fols. 47 and 48.

Fourth. That the court below refused the third prayer for a charge to the jury made by defendants below in these words:

" If the jury shall find from the evidence that the plain- " tiff's decedent was employed by the defendants to pro- " cure the payment of a claim against the United States, " the payment of which was prohibited by law when he " undertook the case, the plaintiff cannot recover unless " he have shown that his decedent either procured or la- " bored to procure such modification of the law as would " remove the bar to the payment of said claim."

See Rec., p. 14, fol. 37.

And that the judge below charged the jury in these words:

" The defendants ask me to instruct you that because " the law did not furnish an equitable blanket wide enough " to cover them, and auxiliary legislation was rendered ne- " cessary to work out justice, that that fact that legislation

" was necessary to the consummation of payment, that that " intervention should defeat the plaintiff. Now the court " does not understand the case in this light, although the " testimony seems to carry this man before committees of " Congress as well as before Departments. But even if it " did not, the fact that such legislation was necessary don't " defeat his right. His clients assumed to have a claim " against the Government, and employed him to prosecute " it, and if informality or technicality rendered legislation " necessary, it was only in aid of his services, and not to " supersede them. That prayer is overruled."

See Record, p. 17, fol. 48 and 49.

Fifth. That the court below refused the fourth prayer for a charge to the jury made by defendants below in these words:

" That the evidence of attorneys or claim-agents tending " to show what is ordinarily charged for 'steamboat claims' " is to be disregarded. Any attorney or claim-agent who " knows the actual amount of work that was performed by " plaintiff's decedent in the prosecution of this claim, and " who is familiar with the price usually charged for such " work, may testify what, in his opinion, such work was " worth; but testimony of what attorneys or claim-agents " generally charge for cases where steamboats have been " seized is not to be regarded by you as a basis of estimat- " ing what the services of plaintiff's decedent were worth."

See Rec., p. 14, fol. 37 and 38.

And that the judge below charged the jury in these words:

" The court has permitted to be given in evidence here " the character of this claim, the character of the profes-

" sional services rendered in its prosecution, the character " of intestate for ability to perform those services, his hon- " esty and skill, and in addition, the customary reward for " this description of services. It is objected here by coun- " sel for defendants that this last is the custom of others " in similar cases," (the word "and" is here probably omitted by a typographical error,) " should not be consid- " ered by you, and should not govern the subject. It should " not alone govern the subject, but is proper to be resorted " to with a view of obtaining what the intestate's compen- " sation should be."

" The ground for paying a large per cent. in contingent " cases is, that the fees for services must bear relation to " and take color from the services performed. If a man " is to spend his time, labor, and learning in the direction " of a given result, to be paid if that result is accom- " plished, and nothing unless it is, the custom of the pro- " fession is as testified to by these gentlemen. You have " listened to it. The intendment of reason, too, attaches, " that the reward shall correspond to the risk of getting " nothing in the case of failure. This testimony is not " final, but it constitutes an element in determining the " amount due the plaintiff."

See Rec., p. 16, fols. 45 and 46.

Sixth. That the court below refused the fifth prayer for a charge to the jury made by defendants below in these words :

" If the jury shall find that the plaintiff is entitled to re- " cover, and shall further find from the evidence that the " series of defendants' claims, of which this is one, was un- " dertaken and several of them prosecuted by Judge John- " son at a compensation of five per cent. on the amount

" recovered, and, further, that, in consequence of a legal " disability to prosecute them further, the said Johnson " turned over said claims to the plaintiff's decedent for " prosecution, then, in the absence of proof to the con- " trary, the jury may infer that the same rate of compen- " sation obtained between Judge Johnson's successor and " the defendants as obtained between them and Judge " Johnson."

And that the judge below charged the jury in these words:

" There has been some intimation that the undertaking " was by special agreement at the rate of five per cent., as " contingent compensation, and the defendants' counsel " appeals to you that there is proof of such a contract; " that the predecessor of Atkinson in the prosecution of " defendants' claims had received five per cent. compensa- " tion on the amounts recovered by him. You had before " you the testimony in that regard as pointing to that com- " pensation. You have heard the testimony of others as " to rates of compensation in such cases. You have the " right to take into consideration the fact of the allowance " made theretofore, under the circumstances under which " it was made, as guiding your judgments to a conclusion. " If that is satisfactory—that there was a contract—you " will hold the parties to the limitation of that contract. " But it must be proved. The law presumes that when " one enters upon labor for another, in the absence of any " special agreement for reward, that he is entitled to and " shall receive such reward as his labor is worth. The " law makes the contract that he shall receive a reasonable " compensation therefor. In the absence of any special " agreement between these parties, the law steps in and " makes the agreement for them. If you find that any

" special agreement was made, your verdict must be lim-
" ited to the amount of that agreement."

See Rec., p. 16, fols. 43, 44, 45.

Seventh. That the judge below charged the jury that the testimony seemed to carry this man (meaning the plaintiff's decedent, Atkinson) before the committees of Congress, as well as before Departments.

See Rec., p. 17, fols. 48 and 49.

Eighth. That the judge below charged the jury that one of the views expressed by him was the christianity of the case, as well as the law, (see Rec., p. 17, fol. 48;) and that he said to the jury, "Take the case and do what is right."

Rec., p. 17, fol. 50.

Ninth. That the judge of the court below charged the jury in these words: "And you may find for him," meaning the plaintiff, "what he ought to receive in the absence " of any proof of a special agreement as to his reward."

See Rec., p. 16, fol. 43, clause 4 of charge.

Tenth. That the judge of the court below charged the jury in these words: "His," meaning the plaintiff's decedent's, "clients assumed to have a claim against the " Government, and employed him to prosecute it; and if " informality or technicality rendered legislation necessary " it was only in aid of his services, and not to supersede " them."

See Rec., p. 17, fol. 49, ninth clause of charge.

designed to form a brief of the argument of counsel for plaintiff in error.

First. On the first assignment of error the plea of *lis pendens* filed by defendants below was good in law, and should have been sustained.

A. The court below possesses the same powers and exercises the same jurisdiction as the circuit courts of the United States.

See Rev. Stat. U. S. relating to the District of Columbia, sec. 760.

B. The court of New London county, Connecticut, was not a foreign court to that of the supreme court of the District of Columbia. The courts of the United States are not foreign to the States.

U. S. Const., art. 4, sec. 1.
U. S. Rev. Stats., sec. 905.

C. The judgment of a State court conclusive in that State is conclusive everywhere. It is put upon the same footing as a domestic judgment.

3 Story on the Const., p. 183, § 1307.

D. Hence the pendency of a suit in a State court may be pleaded in an action for the same cause in the courts of the United States. To tolerate the pendency of several suits at the same time for the same cause would be a reproach to the administration of justice.

Earl *vs.* Raymond, 4 McLean, pp. 234 and 235.

Second. On the second assignment of error, a contract to prosecute and collect a claim from one of the departments of the United States Government for a compensation of a percentage on, or portion of, the amount to be collected, is against public policy and the laws of the United States, since such contract virtually assigns to him who undertakes the collection a part of the claim, and an interest therein.

A. The statute in force at the time this contract is alleged to have been made, and the services rendered, was the—

Sec. 1, act of Feb. 26, 1853, 10 U. S. Stat. at Large, p. 170.

B. And is now—

U. S. Stat. at Large, sec. 3477, p. 693.

C. On the question of public policy, we rely on—

Marshall *vs.* B. and O. R.R. Co., 16 Howard, p. 374.
Tool Co. *vs.* Norris, 2 Wallace, p. 56.
Trist *vs.* Child, 21 Wallace, p. 541.

D. The statute of 26th February, 1853, above referred to, is one designed to prevent maintenance and champerty in claims before the Departments, and such a contract as the one here in question would be held tainted with both.

See Earle *vs.* Hopwood, 99 Eng. Com. Law Rep., Phila. ed., p. 564.
See *In Re* Attorneys' and Solicitors' Act, 1870; Law Reports, division 1, Chancery, 1876. Part IV, April 1; vol. 1, p. 573.

Third. On the third assignment of error.

The alleged contract was for the personal services of the plaintiff's decedent, and was for the exertion of skill, learning, and ability peculiar to him, as he had at one time been Third Auditor of the Treasury, (see Rec., p. 12, fol. 29,) and knew the rules of the Treasury Department, (Rec., p. 13, fol. 31,) but died after the claim was allowed by the accounting officers of the Treasury, but before the warrant therefor issued.

See Rec., p. 13, top.

He was seized with mental disease, and became insane shortly before.

Rec., p. 16, fol. 47.

That the settlement of the claim was made by the Second Comptroller in January, 1870, but the warrant was suspended by the Secretary of the Treasury on account of the supposed want of jurisdiction, (see Rec., p 13, fol. 32,) and that the warrant did not issue until 7th March, 1871. (See Rec., p. 13, fol. 32.) Atkinson died February 25, 1871.

Rec., p. 12, fol. 29.

Fourth. On the fourth assignment of error the plaintiff's decedent, Atkinson, undertook to prosecute before the departments of the United States Government and collect a claim for the use by the United States Government and the officers and employés thereof of certain steamboats, (see Rec., p. 7, fol. 12; Rec., p. 14, fol. 35,) during the war of the rebellion, at New Orleans, Louisiana. (Rec., p. 12, fol. 29.) The services are alleged to have been per-

formed before the Third Auditor and Second Comptroller from the year 1865 to 3d February, 1870.

See Rec., p. 5, fol. 5.

During the whole of that time the legislation of Congress forbade the settlement and allowance of such a claim.

The act of July 4, 1864, (13 U. S. Stat.-at-Large, p. 381, sec. 1,) provides that the jurisdiction of the Court of Claims shall not extend to such a case as that of the defendants below which went into Atkinson's hands to be prosecuted before the Departments.

The act of (9th) 19th February, 1867, (14 U. S. Stat.-at-Large, pp. 397–8,) forbids the *settlement* of such a claim as Atkinson agreed to prosecute.

This act took away all right to settle such a claim from the Executive Departments as the former act did from the Court of Claims.

The joint resolution of 23d December, 1869, (16 U. S. Stat.-at-Large, p. 368,) modified the foregoing restrictions in the case of claimants for compensation for steamboats and vessels taken without the consent of the owners or impressed into the service of the United States during the late war in States in insurrection, when the claimants were loyal when their claims originated, and remained loyal thereafter and were residents of loyal States, and the steamboats or other vessels were in the insurrectionary districts by proper authority, viz., charter, contract, impressment, or in conformity with rules and regulations of the Treasury Department, approved by the President of the United States.

And the joint resolution of March 3, 1871, (16 U. S. Stat.-at-Large, p. 600,) added, "or in conformity with the laws of the United States."

The undertaking of Atkinson, then, was to induce the

accounting officers of the Treasury to do what the law forbade them to do, and so was an illegal contract, and cannot be enforced.

See 1 Parsons on Contracts, 456.

Fifth. On the fifth assignment of error. The theory of plaintiff's case is that defendants below made an arrangement with Atkinson to collect their claim on a contingent fee, but that there was no arrangement or agreement as to the rate or amount of compensation. The case therefore is one of an entirely exceptional character, for experience shows the universal custom in cases of contingent fees is to fix in advance the amount or percentage of the claim to be paid in case of success.

What the rate of compensation should be, in the absence of an agreement, must be what the services are worth in the particular case. It is plain that proof of the rate usually agreed upon where the rate is stipulated by contract is of no value in such a case as this. The legal proof required is that of the amount of labor performed and the estimate of experts as to what such labor was worth.

The proof actually made was that the service rendered in this case consisted in preparing and filing printed briefs. (See Rec., p. 13, fol. 31.) The statement of the services of the boat while impressed in the employment of the United States was made up in the War Department before the case went to the Treasury, and before Atkinson was engaged.

See Rec., p. 14, fol. 35.

Now the proof admitted as to value of services was not what such service was worth, but "that attorneys who

" prosecute steamboat claims before the Departments usu-
" ally charge contingent fees of from 20 to 25 per cent."
This proof should have been ruled out by the court.

Sixth. On the sixth assignment of error.

It appears that this claim of defendants below on the United States was at first in the hands of Judge William Johnson, and when he gave it up, at Stanton's request, Atkinson was employed to continue the prosecution of said claim. (See Rec., p. 12, fol. 30.) It is certain that Johnson's compensation for fees was only five per cent., (see his receipt, Record, p. 13, fol. 33,) and in one of the claims of Stanton, Atkinson himself united in a receipt at the rate of five per cent. (See his receipt, Rec., p. 13, fol. 34, and Rec., p. 14, top.) While in the suit instituted in Connecticut by the plaintiff for the claim made in this, it is distinctly alleged that the compensation of Atkinson's services was to be by agreement five per cent. on the amount he might collect.

See Rec., p. 7, fol. 13.

Here, then, is evidence, both direct and indirect, of what the rate of compensation was to be. Here is proof of a contract, both express and implied, and no parol evidence to vary it should have been admitted.

Seventh. On the seventh assignment of error. In giving a charge to a jury the judge has no right to state that facts seem to be proved; when such is not the case, such a statement from the court leads the jury astray. The proof below was that Atkinson did nothing to bring about the legislation which finally empowered the Department to pay the claim, (see Record, p. 14, fol. 35;) and when the judge told the jury that the testimony seems to carry this

man before the committees of Congress, as well as before the Departments, (see Rec., p. 17, fol. 49,) he stated inadvertently something not proved, which tended to produce in the minds of the jury the belief that Atkinson had aided in bringing about the beneficial amendatory legislation, and thus gave them an erroneous idea of the merit and value of his services.

Eighth. On the eighth assignment of error.

The cases of litigants in a court of law are to be tried and disposed of by the court according to the rules of law alone, and to invoke other sentiments, however respectful in themselves, is clearly no part of the duty of a judge, and is well calculated to mislead a jury as to the principles by which their judgment should be guided in coming to a conclusion; and when his Honor, the judge of the court below, told the jury that one of the views he presented was the christianity as well as the law of the case, (Rec., p. 17, fol. 48,) he indulged in expressions which, with many others in the charge, were unsuited to the system of jury trial.

In delivering the opinion of the supreme court of Pennsylvania in a recent case, Agnew, C. J., said:

"The language of hyperbole is suited to the purpose of "the advocate who would enforce his thought by striking "and intense expressions, in order to deepen its effect, and "by the exaggeration lead the minds of his hearers into "the fever of his own heated fancy. But weak and incon-"clusive facts, when thus presented by a judge, can only "mislead. Jurors, catching the tone and temper of their "conclusions from the strong and figurative style of the "judge, fail to give to the facts their true weight, which a "a cool and fair statement is calculated to produce."

See Cox *vs.* Derringer, opinion delivered October 10,

1876, and reported in the Philadelphia Legal Intelligencer of October 20, 1876.

We are equally justified in complaining of the judge's saying to the jury, "Take the case and do what is right;" for this, in connection with the other, tended to make the jury think they were to decide not according to law, but on some higher rule of action exciting their sympathies for the deceased.

Ninth. On the ninth assignment of error.

The form of expression employed by the judge of the court below, saying, "And you may find for him what he "ought to receive in the absence of any proof of a special "agreement as to his reward," (see Rec., p. 16, fol. 43, clause 4,) tended to mislead the jury in different ways. First. It was calculated to make them believe that there was no proof at all of a special agreement for compensation, either direct or indirect; Second. That the jury could give such compensation as they pleased without regard to the strict law of the case.

Tenth. On the tenth assignment of error.

In saying to the jury that "if informality or technicality "rendered legislation necessary, it was only in aid of his "services," &c., (see Rec., p. 17, fol. 49,) the judge of the court below used expressions tending to misdirect the jury as to the real character of the action of Congress with regard to such claims, the objection being founded on positive legislation, and not on technicality or informality, and the jury must have inferred from what the judge said that they could treat the acts of Congress as mere technicalities, and disregard them; whereas the acts of Congress announced a rule of action binding on all the Departments

of the Government, not prescribing forms or modes of proceeding, but forbidding the settlement of certain claims.

By a clerical error in the motion on page 18 of the Record, fol. 34, Mr. Hornor is made to appear as attorney for plaintiff, Embry. He was really attorney for defendant, Stanton.

Respectfully submitted.

DURANT & HORNOR,
for Plaintiffs in Error.

WASHINGTON, D. C., *November* 13, 1876.



Supreme Court of United States.

JOSEPH W. STANTON, et al.
Pl'ff in Error,
vs.
JAMES H. EMBREY, Adm'r of
J. W. ATKINSON,
Deft. in Error.

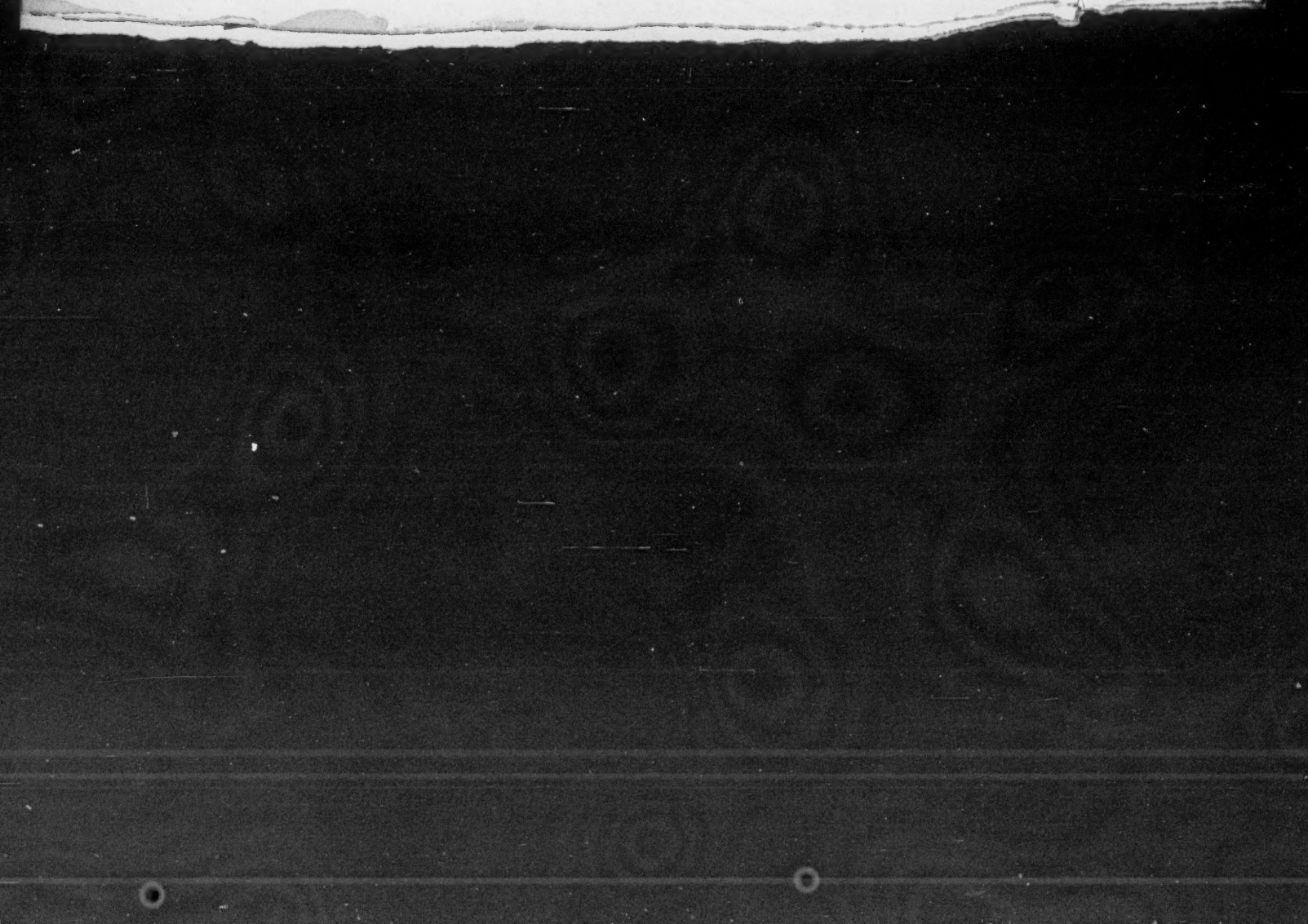
No. 159.

Error to the Supreme Court of the District of Columbia.

BRIEF OF DEFENDANT IN ERROR.

EDWARD LANDU,
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Attorneys.

WASHINGTON:
R. O. Polkinhorn, Printer,
1876.



Supreme Court of United States.

ERROR TO THE SUPREME COURT, DISTRICT OF COLUMBIA

JOSEPH W. STANTON, et al.,
Plaintiffs in Error,
vs.
JAMES H. EMBRY, *Administrator of*
R. J. ATKINSON, *deceased,*
Defendant in Error.

No. 159.

BRIEF OF DEFENDANT IN ERROR.

This was a suit for professional services rendered by Atkinson in his life time for plaintiffs in error.

Declaration filed January 13. 1872.

To this declaration defendants below pleaded in abatement another suit pending in the State of Connecticut for the same cause of action.

To this plea plaintiff below filed a demurrer, which demurrer was sustained by the court and leave given to plead over. The defendants below then plead in bar the general issues of *nil debe* and *non assumpsit*, on which issues were joined, and the case went to trial March 12, 1873.—Record, p. 10.

March 13, 1873, the jury rendered a verdict for plaintiff below for $9,185.18.—Record, p. 11.

On same day defendants below filed a motion for new trial upon the exceptions taken.—Record, p. 11.

March 17, 1873, defendants below filed a motion for new trial, for reasons of excessive damages, and newly discovered evidence.—Record, p. 11.

April 19, 1873, the court overruled the motion for new trial.—Record, p. 12.

May 3, 1873, the bill of exceptions was signed by the Chief Justice who presided at the trial, which bill of exceptions was filed August 13, 1874.—Record, p. 17.

September 29, 1873, the motion for new trial was heard at the General Term of said court on appeal, which court affirmed the decision of the Circuit Court, and rendered judgment on the verdict of the jury.—Record, p. 18.

Points.

I.

This court has no jurisdiction over the subject-matter of the first error assigned seeking to review the judgment of the Circuit Court upon a demurrer to a plea in abatement.—Sec. 1,011, Revised Statutes.

a. The filing of pleas in bar, and trial thereon, after judgment sustaining the demurrer, to a plea in abatement, is an acquiescence in such judgment.

Bell vs. Railroad Co., 4 Wall., 598.
United States vs. Boyd, 5 How., 29, 51.
Townsend vs. Jennison, 7 How., 706.
Morsell vs. Hall, 13 How., 212.
Shepherd vs Graves, 14 How., 505, 512.
Spencer vs. Lapsley, 20 How., 264.

b. There was no error in the Circuit Court in its judgment upon such plea in abatement.

Bowen et al. vs. *Joy*, 9 Johnson, 219, which was a suit brought in the State of New York, and the defendant

interposed a plea of another suit pending in the State of Massachusetts, and the court says: "The pendency of a suit in a foreign court by the same plaintiff against the same defendant for the same cause of action is no stay or bar to a new suit instituted here."

Also West vs. McConnell, 5 Lou., 424.
7 Am. Com. Law, 357.
Lowry vs. Hall, 2 Watts & Sargent, 133.
McJilton vs. Dove, 13 Ill., 494.
Walsh vs. Durkin, 11 John., 99.
Salmon vs. Wootten, 9 Dana, 422.

The courts of the District of Columbia are not courts of the United States, as provided by the Constitution, but are in the nature of territorial courts, and are established by Congress under the powers delegated to it by the Constitution, to control the territory selected as the seat of government.

II.

The other nine errors assigned, are each based upon the instructions of the justice presiding at the trial, to the jury, as contained in the bill of exception which is contained in the printed record in this case.

This bill of exceptions is not legitimately a part of the record in this case for reasons following, viz:

1st. The record (p. 17) states "To which overruling of said prayers, and to which refusals, and to each of them, the defendants, by their counsel, excepted *before the giving of their verdict*, and to the said charge of the said Chief Justice in so far as it substituted instructions thereof numbered 3, 5, 6, 7, 8, 9, 11, and to each of them, the defendants, by their counsel excepted *before the giving of the verdict.*" The exceptions should, in order to be of any effect, have been taken before the jury retired, so

that the justice might have opportunity of correcting his charge if he saw proper so to do.

15 How., 165.

2d. Rule 64 of the Supreme Court, D. C., in force at the time of the trial, reads as follows:

"If the final judgment is to be reviewed by proceedings in error in the Supreme Court of the United States, the bill of exceptions if not settled and signed and sealed at the trial, and before verdict, must be so done *within four days after verdict*; and in that case it shall be stated to have been done now for then."

Rule 68, is as follows: "In every case the fact of the settling and filing of the bill of exceptions and that it is made part of the record shall be noted in the minutes of the court."

(See Rules of Supreme Court of District of Columbia issued 1869, p. 18.)

The bill of exceptions was not settled and signed within the time required by the 64th rule. On the contrary, there was an interval between the date of the verdict (13th March, 1773,) and the date of the bill of exceptions, (May 3, 1873,) a period of over fifty days, and there is in the record no excuse for such delay, nor any reason shown why the rule was not complied with.

This bill of exceptions was not filed in the court until the 13th day of August, 1874, a period of one year and three months after its date, and nearly ten months after the cause was heard and decided in the general term of said court on appeal, and the minutes of the court nowhere make any note of the settling and filing the bill of exceptions and a paper filed more than a year subsequent without any order of the court therefor, cannot become a part of the record. It is true there appears endorsed on the paper the following: "Filed August 13, 1874, *nunc pro tunc*," but there appears no signa-

ture to such endorsement, nor any authority from the court to file the same, and without such authority the regularity of such filing cannot be presumed, especially when there is no evidence that the bill of exceptions was ever considered by the court on appeal.

The court below, in general term, committed no error in overruling the motion for new trial on exceptions when there was no bill of exceptions before it, and a bill of exceptions subject to so many and fatal defects will not be considered by this court.

Muller *et al.* vs. Ehler, 1 Otto, 249.

III.

There was, however, no error in the refusal of the court to grant the prayers of the defendants below, and in the substitution of the instructions as given. The exceptions to overruling the prayers are general, and the exceptions to the charge are to certain paragraphs, without, however, designating the particular portions that are objectionable.

The service for which the suit was instituted seems to have been in performing the requisite labor in preparing the papers, briefs, &c., for the collection of a claim for compensation for the use of certain steamers used by the United States during the rebellion at New Orleans, and the third prayer asked by the defendants is predicated upon the supposed fact that the payment of the claim was at one time prohibited by law, and that unless the plaintiffs intestate procured, or labored to procure, through Congress such legislation as would authorize the payment of the claim, the plaintiffs ought not to recover. Such service would have been repugnant to public policy, and every contract having such service for its foundation would have been invalid. The duties of the attorney were to expound the laws and not to make them.

The instruction as asked, therefore, was properly refused by the court.

But it is contended in the argument upon the fourth assignment of errors taken to the third prayer that the undertaking of Atkinson, from 1865 to 1870, was to induce the accounting officers to do what the law forebade them to do, and therefore it was an illegal contract.

The statute of 1817 provides that all claims and demands whatever by the United States or against them shall be settled and adjusted at the Treasury Department. (Sec. 236 Rev. Stat., also 3 Stat., 366.)

Sec. 277 provides that the Third Auditor shall receive and examine all accounts relating to the Quartermaster's Department, and after examination shall certify the balance and transmit such accounts with all vouchers and papers and certificates to the Second Comptroller.

Sec. 224 provides that it shall be the duty of the Second Comptroller to examine all accounts settled by the Auditor and certify the balance to the Secretary of the department in which the expenditure has accrued.

In the examination of the claims and accounts such officers are necessarily vested with at least *quasi* judicial functions—they are to determine all questions that may arise in the course of such examination, whether of fact or of law, and their decisions are final, for there is no appeal to any other tribunal, except Congress.

The act of 1864 relied upon as prohibiting the settlement of this class of claims did nothing of the kind. It simply provided that the Court of Claims should not have jurisdiction, and provided that the claims of loyal citizens in *States not in rebellion*, for subsistence and quartermaster's stores should be presented to the Quartermaster General, to be by him examined, who might report such case to the Third Auditor with a recommenda-

tion of payment, thus transferring the jurisdiction as to the preliminary examination over the class of claims therein specified to the Quartermaster General.

The act of 1867 provided that the act of 1864 should not be construed to authorise settlement of claims for supplies and quartermaster's stores in States in rebellion. (14th Stat., 397.)

Now, whether this was merely a restriction of the class of claims to be under the jurisdiction of the Quartermaster General, or whether it, at the same time, restricted such settlement in all departments, is a question in doubt. It did not in terms deprive the Treasury Department of jurisdiction over this class of claims, but that department treated it as doing so by implication.

The act of 1869, which is quoted in plaintiff's brief, (p. 19,) was evidently held by the accounting officers as authorizing them to settle and adjust this claim, wherefore in the month of January, 1870, settlement was made by the Second Comptroller in favor of the defendants below of $45,925.41, but the warrant was suspended by the Secretary of the Treasury on account of the supposed want of jurisdiction, (p. 13, Record,) and so remained suspended until after the passage of the act of March 3, 1871, which amended the act of 1869 by adding the words "or in conformity with the laws of the United States."

Whether the accounting officers were correct, or whether the Secretary was correct in his view of the law, we have no means of knowing, as the record gives no more definite information of the nature of the claim thus presented; but it is not to be presumed that such officers would entertain a claim on which their jurisdiction was clearly prohibited by law. At least there was not such a positive prohibition of jurisdiction as would make a contract with an attorney for prosecution before such officers void.

It will be noted that the justice, in all parts of his charge, was careful to keep before the minds of the jury the distinction between services rendered professionally and within the strict professional rules, and the use of personal or official influence to induce the desired results for his clients, and as the charge so closely follows the rules of law laid down by this court it is unnecessary to dwell upon the comparison.

Wright vs. Tibbetts, 1 Otto, 252.
Wylie vs. Coxe, 15 How., 415.
Trist vs. Child, 21 Wal., 450.

This disposes of errors 2, 3 and 4, as assigned.

IV.

The fifth error is assigned upon the refusal of the court to grant the fourth prayer wherein the court is asked to instruct the jury to disregard evidence admitted without objection, and as to which there was no motion to exclude, and the giving of the instructions contained in paragraphs 6 and 7 of the charge.

Upon this the point is made that, upon a *quantum meruit* the element of contingency could not be considered by the jury. It cannot be denied, under the principles of the cases above cited, that a contract may legally be made by an attorney to receive a fee contingent upon the result, and that being so there was no error in the charge of the court wherein he instructed the jury that they might take into consideration previous dealings between defendants below and Atkinson and his predecessors, where a small commission was paid, "the character of the claim, the character of the professional services rendered, the character of intestate for ability to perform those services, his honesty and skill, the customary reward for this description of services," and the contingent character of the contract, the latter not final but as constituting an element in determining the amount.

V.

In the sixth error assigned, it is attempted to raise the question made in the court below on the motion for a new trial for excessive damages.

Inasmuch as all the evidence is not before the court, even if this court otherwise had the power so to do, it could not review questions of fact. But in no case will this court review questions of fact. (Rev. Stat., sec. 1,011.)

The court will not review an order of an appellate court affirming an order overruling a motion for a new trial in an inferior court.

Sparrow vs. Strong, 4 Wal., 584.
Boswell vs. De LaLarge, 20 How., 29.
Henderson vs. Brown, 5 Cranch, 12.
Barr vs. Grntz, 9 Wheaton, 220.

In relation to the claim that the facts showed a contrac- for five per cent., or at least that from the previous dealings between the parties such a contract can be inferred, the court charges the jury, that if such a contract is proven the parties are bound by it, that they might take into consideration the previous dealings not only between the parties to the suit but also with the predecessors of Atkinson as guiding their judgment to a conclusion.

Seventh error. No exception was taken to this part ticular portion of the charge.

Eighth error. This is part of paragraphs 8 and 12, which was not excepted to.

Ninth error. This is to paragraph 4, which is not excepted to.

Tenth error. This is to a portion of the 9th paragraph of the charge and not specially excepted to.

Taking this charge as an entirety it was fair and impartial. The justice scrupulously left to the jury all ques-

tions of fact, whether or not there was a contract between the parties for any specific compensation, the previous dealings of the parties, the character of the services performed, the character of the intestate for ability to perform the services, his honesty and skill, and in paragraph 10, of the charge he cautions the jury thus: "In reference to the amount of your recovery you should be reasonable in this case as in all others. The profession of the law is an honorable one, an enlightened one, but it has its excesses, and its professors are liable to run into those excesses, you are to be regulated here by the same solid, substantial considerations of justice that you exercise with reference to any other claims."

If there was any misstatement of the evidence, such mistatement was favorable to the defendants below, as for instance, the record shows (p. 13) that the evidence of the usual charge for such service to have been from 20 to 25 per cent., whereas the evidence as stated by the court in that respect was from 10 to 25 per cent. (par. 11, of charge.)

Upon the whole case, it would appear that the main object of the defendants below has been to delay payment of a just claim, wherefore damages are asked under rule 23 of this court.

A. L. MERRIMAN,
Atty. for Deft. in error.

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